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(18)

No. 06-457

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

CUSHLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

Maine, like many States, permits tobacco products to be sold over the telephone or Internet and then delivered to the purchasers. Such sales create obvious risks that the tobacco products will end up in the hands of minors, in violation of state law and federal policy. Maine therefore adopted several common sense provisions designed to protect against that danger. The FAAAA does not preempt those laws.

No party suggests that the FAAAA preemption provisions can be read literally. A literal reading of the provisions would require the preemption of all 50 States' laws banning the sale of tobacco to minors, for such laws prevent carriers from delivering tobacco in some instances and thereby eliminate a "service" they might otherwise provide. The United States candidly concedes that such laws are not preempted (U.S. Br. 29); Respondents tacitly concede this by not contesting the First Circuit's holding that the first sentence of 22 Me. Rev. Stat. §1555-D (barring the knowing transport of tobacco from unlicensed retailers to unlicensed recipients) is not preempted. Resp. Br. 24, 44. The challenge, then, is to give meaning to the preemption provisions while not reading them so expansively that they preempt state laws that Congress did not intend to supersede.

This Court faced a similar challenge in its ERISA cases, finding that statute's "relate to" preemption language to be "unhelpful" and "frustrating." *New York State Conference of Blue Cross & Blue Shield*

Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). The Court concluded that it must "look instead at the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656. That reasoning fully applies to the FAAAA.

No one can seriously dispute that Congress' objective in enacting the FAAAA was to free motor carriers from state economic regulations that interfered with competition for markets. Neither Respondents nor the United States provided an iota of evidence suggesting that Congress was concerned with state health laws, generally, or state contraband laws, specifically. "Congress understood" that those types of laws "would survive." Accordingly, the FAAAA does not preempt the two Maine provisions at issue. The same result obtains when those two provisions are assessed under the ERISA "reference to" or "connection with" test. The provisions do not specifically reference carriers subject to the FAAAA; and they either place no impositions on carriers (in the case of §1555-C(3)(C)) or only minor impositions (in the case of §1555-D).

Respondents take a different approach, which is at once wildly expansive and internally inconsistent. While asserting that state laws affecting UPS by "even a second" (Resp. Br. 8) are among the evils Congress sought to address, they simultaneously seek to comfort the Court by asserting that many of the state contraband laws called into question by the First Circuit's ruling are not preempted "because they make criminal only the 'knowing' transportation of

certain items" while refusing to acknowledge that a state can use the only identified evidence to establish knowledge. Resp. Br. 46. This Court should reject Respondents' invitation to read the FAAAA preemption provisions in a manner that is unworkable and far beyond anything Congress could possibly have envisioned.

I. The FAAAA Does Not Preempt The Maine Laws Because Congress Did Not Intend To Preempt State Health And Contraband Laws When It Enacted The FAAAA.

A. The "Objectives of the" FAAAA Are "a Guide to the Scope of the State Law that Congress Understood Would Survive."

Respondents contend that the FAAAA preemption provisions are sufficiently different from the ERISA preemption provision that the Court should not apply the rule that it "look . . . at the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive." Resp. Br. 27-28; *see also* U.S. Br. 9-10. Instead, assert Respondents, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), provides the last word on construing the FAAAA. That contention lacks merit.

First, the *reason* the Court relied on ERISA cases in *Morales* retains its vitality. Both preemption provisions use the phrase "relate[] to." In *Travelers*, the Court recognized the difficulties with that phrase,

observing that it cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." 514 U.S. at 656. The same problem necessarily applies when that term is used in the FAAAA (and the ADA). It makes no sense to assert that "relates to" "extend[s] to the furthest stretch of its indeterminacy" when used in ERISA, but not when it is used in the FAAAA. The problem exists in both statutes; and the Court's solution to the problem fully applies to both. There is no basis upon which to believe that Congress, when it enacted the FAAAA, would *not* have wanted its objectives to serve as "a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656.

Second, early ERISA and ADA cases presented clear situations where the state laws were pre-empted; it was not until *Travelers* that the Court addressed closer cases, requiring further refinement of the preemption analysis because the limitless "relates to" language was "unhelpful." *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund*, 520 U.S. 806, 813 (1997). The Court in *Travelers* did not so much change its analysis, as Respondents suggest, but rather applied time-honored, common sense considerations to avoid over-broad results unintended by Congress. In *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 438, 440-41 (2002), the Court essentially adopted this approach for the FAAAA, explaining that FAAAA preemption analysis begins with the presumption against preemption and requires

resort to the objectives of Congress revealed by, *inter alia*, the legislative history.

Third, the difference between ERISA and the FAAAA upon which Respondents and the United States rely does not justify reading the FAAAA's provisions more expansively. To be sure, ERISA creates a uniform body of federal law, whereas the FAAAA was "adopted as part of the *deregulation* of transportation industries." U.S. Br. 10. That difference does not, however, militate in favor of giving a broader reading to the FAAAA preemption provisions. In the first place, it only begs the question of the breadth of state laws that are either replaced by federal law or by nothing at all. Moreover, the danger of reading a preemption provision more broadly than Congress intended is far higher when there is no federal law serving as a backstop. For this reason, in *Morales*, 504 U.S. at 390-91, and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 224 (1995), the Court was careful to point out that there was a federal agency that could deal with false advertising and frequent flier issues even though the States could not. Here, of course, no federal agency regulates youth access to tobacco.

Finally, Petitioner's reading of the FAAAA is consistent with the recognition in *Morales* that the Court was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines." 504 U.S. at 390. The Court clearly understood that laws removed from

Congress' core objectives are to be dealt with differently than laws that go to the heart of Congress' concerns.

B. When It Enacted the FAAAA, Congress Did Not Have the Objective of Preempting State Health and Contraband Laws.

In *Travelers*, this Court stated that "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulations, which historically has been a matter of local concern." 514 U.S. at 661 (citation omitted). The same is true for the FAAAA.

1. After carefully scouring the background and legislative history of the FAAAA, the ADA, and other federal laws and regulations, neither Respondents, the United States, nor their supporting *amici* uncovered even a hint that Congress intended to preempt state public health or contraband laws. To the contrary, the committee report used the term "economic regulations" nine times, and never suggested preemption of *all* regulations having an effect on carriers' operations. H.R. Conf. Rep. No. 103-677, 82-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1754-60. The testimony, particularly from the Department of Transportation (DOT), explained the problem to be "economic regulations" such as "entry controls, tariff filings, and rate regulation, restrictions on operations and grants of antitrust immunity" generally under the auspices of state public utilities commissions. *Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the House Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.* ("*FAAAA Hearing*"), 103d Cong., 2d Sess. 21, 22, 23, 27 (1994).

DOT determined which States had problematic laws warranting preemption "based on [its] interpretation of what constitutes economic regulation." *Id.* at 23. Based on its understanding of the "economic regulations" to be preempted (*e.g.*, tariffs and entry restrictions), DOT, and the committee itself, determined that Maine (which had public health contraband laws on the books at the time) was already deregulated. Pet. Br. 33-34 (citing testimony). Indeed, one searches the 85-page report submitted by DOT (*FAAAA Hearing*, VI) in vain for a single indication that a health or contraband law was a concern prompting the legislation. U.S. Dept. of Transportation, *Report to Congress: "Impact of State Regulation on the Package Express Industry"* (September 1990).

This reading of the history of the passage of the FAAAA is confirmed by the committee's reliance upon *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). The Ninth Circuit recognized that the ADA's preemption provision "should be understood as allowing the state to act in an area of non-economic legislation." 936 F.2d at 1078. Respondents concede that, along with *Morales*, this was the only decision relied upon by the committee, yet they

misread its import. Br. 26. Contrary to their assertion, the decision was not cited by the committee only for the "anomalous result" of air and motor carriers being treated differently. Rather, the committee understood from DOT's testimony that the FAAAA "would codify in law the Ninth Circuit FedEx decision, *but also* would make the regulatory exemption available to a much broader class of carriers." *FAAAA Hearing*, 22 (emphasis added); *see also* Pet. Br. 30.[1]

2. Prior to this case, the United States repeatedly explained to this Court that Congress did not intend to preempt regulation of motor carriers in general, but just *economic* regulation:

> In describing the type of regulation that had been found to burden interstate commerce, the Conference Report referred specifically to "*[s]tate economic regulation* of motor carrier operations." The italicized language is significant in two respects. First, that language is clearly intended to describe the category of regulation that is subject to the general rule of preemption established by [the FAAAA]. . . . Second, the Conference Report referred to the deleterious effects not of state motor carrier regulation generally, but of "state *economic* regulation."

City of Columbus v. Ours Garage & Wrecker Service, Brief of the United States as *Amicus Curiae*, 23-24 (italics in original) (citations omitted). Similarly, in supporting the preservation of "state laws prohibiting 'gambling, prostitution, or the sale of illegal drugs . . . by an airline,' . . . or the like," the United States explained that "[u]nlike state laws regarding air fare advertising, those state laws do not relate to rates, routes, or services in a manner implicating competition or the pro-competitive policies of the [ADA]." *Morales*, Brief of the United States as *Amicus Curiae*, 30-31 (citations omitted). Neither do Maine's tobacco delivery laws. Just as Congress did not intend that gambling, obscenity and prostitution laws "relate to" "services" under the ADA, Congress did not intend that state health and contraband laws "relate to" "services" under the FAAAA.

3. Respondents argue that Congress' primary objective was to eliminate state laws of all kinds that might create a "patchwork" and affect the "uniformity" of carrier procedures. Resp. Br. 35-36. This argument is contradicted by Respondents' acceptance of the validity of state laws, such as the first sentence of §1555-D, that prohibit the knowing delivery of contraband. Different States can promulgate different permutations of bans on the transport of unhealthy items, such as cigarettes, cigars, smokeless tobacco, gambling material, obscene material, alcohol, firearms, or wildlife. In other words, a patchwork is

[1] The United States has it backwards when it suggests that this decision indicates an expansion of preemption beyond economic regulation insofar as the Ninth Circuit noted that certain types of preempted state regulations were not "patently economic." U.S. Br. 25. That only supports Petitioner's view that a court must determine if the objectives of the state statute are economic or noneconomic, be they patent or not.

inevitable for the laws that Respondents concede are not preempted. And, for that matter, under *Morales*, there is no suggestion that States must be uniform with respect to gambling, prostitution and obscenity laws, even as they affect the services offered by airlines.

In support of their "patchwork" argument, Respondents distort a phrase in the committee report to suggest that the concern was over the "'sheer diversity of [state] regulatory schemes.'" Resp. Br. 4 (bracketed word added by Respondents). The actual text, however, is "sheer diversity of *these* regulatory schemes," and "*these* regulatory schemes" refers only to "State *economic* regulation," twice identified as the problem in the preceding sentences in the same paragraph. Conf. Rep., 87, *reprinted in* 1994 U.S.C.C.A.N. 1759 (emphasis added). State laws licensing only particular carriers to ship "types of commodities" were a perceived problem, Resp. Br. 41, but unhealthy *contraband* is not considered to be a *commodity* and Respondents identify nothing indicating otherwise. None of the examples in the committee report or testimony hinted that state regulation of contraband, in particular tobacco, was "economic regulation." *See* Pet. Br. 31-35 & nn.40-42. As a matter of both common sense and tradition, the sphere of public health laws is distinct from the sphere of economic regulation of carriers.

For similar reasons, Respondents' assertion that federal laws can "have effects beyond those enumerated in the legislative history" and so preempt public

health as well as economic regulations misses the mark. Resp. Br. 41 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). *Oncale* spoke of "statutory prohibitions [that] go beyond the principal evil to cover reasonably comparable evils." 523 U.S. at 79. But public health laws are not a "reasonably comparable evil" to the problem of *economic* regulation. While federal legislation does not need to be surgically precise, it should not be read to preempt an entire set of a state's traditional police powers unless the congressional intent is manifest.

4. Respondents miss the point when they assert that Petitioner's position is inconsistent with the list of exceptions set forth in 49 U.S.C. §§14501(c) and 41713(b)(4)(A). The issue is not whether there is a specific health "exception" or a specific contraband "exception." Rather, the issue is discerning Congress' objectives in enacting the FAAAA, which will serve "as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656. As we have noted (Pet. Br. 34-35), ERISA's preemption provision also contains specific exceptions, but this Court has rejected preemption challenges to several state laws that did *not* fall within those exceptions. The limitless nature of "relates to" provisions requires courts to do more than determine whether a specific exception applies. And the legislative history of the exceptions supports that conclusion. Pet. App. 35 (showing that Congress did not intend the list to be "all inclusive"). Respondents' theory that exemption from FAAAA preemption is

limited to state laws that are part of "an existing comprehensive federal regulatory scheme" (Br. 38-39), conflicts with the committee's explanation that state authority in the enumerated but "not . . . all inclusive," "partially-identified" areas "is unchanged, since State regulation in those areas is not a price, route or service." Conf. Rep., 84, *reprinted in* 1994 U.S.C.C.A.N. 1756. There was no suggestion that federal involvement was a prerequisite for exemption.

5. Finally, Respondents suggest that it is unworkable to determine whether the purpose of a state law is to further public health or rather is economic in nature. Resp. Br. 20, 42; *see also* U.S. Br. 27-28. This is neither an unexpected nor difficult task. Indeed, in *Ours Garage*, 536 U.S. at 442, the Court held that only a state tow truck law that is "genuinely responsive to safety concerns" falls within the exception set forth in §14501(c)(2)(A). *See also* Pet. App. 26 n.38 (citing cases); *Omya v. State of Vermont*, 33 Fed. Appx. 581 (2d Cir. 2002) (permit limiting trucking which seeks to achieve noneconomic goal of environmental protection not preempted by FAAAA). And in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 105 (1992), the Court explained that courts look to the purpose and effect of state statutes in assessing preemption challenges. Courts consider the purposes of state laws in a wide variety of constitutional contexts, in particular when applying the presumption against preemption. Indeed, the Court in *Morales* had no problem recognizing States' public health authority regarding prostitution and gambling,

even though Congress was silent on the issue, 504 U.S. at 390; *see also* U.S. Br. 17 (proposing test requiring state law to have a public purpose).

C. Sections 1555-C(3)(C) and 1555-D Are State Health and Contraband Laws that Fall Beyond the Scope of State Laws that Congress Intended to Preempt.

1. Sections 1555-C(3)(C) and 1555-D fall far outside the scope of laws Congress was targeting when it enacted the FAAAA. These statutes are straightforward health and contraband laws that were designed to prevent tobacco products from falling into the hands of minors. Every indicator of the "objectives of the [FAAAA] statute" is that such laws are the sort of "law[s] that Congress understood would survive."

Respondents' suggestion (Br. 5, 28) that §§1555-C(3)(C) and 1555-D were merely designed to increase tax revenues is belied by the district court's findings that the challenged provisions dealt *not* with tax collection, but with public health. Pet. App. 61 n.83. To the extent the provisions increase tax collections, they have the public health effect of keeping tobacco out of the hands of children for the obvious reason

that the more expensive tobacco is, the less likely children can afford to buy it.[3]

2. The Synar Amendment confirms the wide gap between the Maine laws and Congress' objectives in enacting the FAAAA. Sections 1555-C(3)(C) and 1555-D further Maine's efforts to comply with the Synar Amendment. It is difficult to imagine that the FAAAA meant to forbid these state efforts. That Amendment was passed in 1992 after the ADA, which is the model for the FAAAA, and there is nothing in the passage of the FAAAA in 1994 or the promulgation of the Amendment's regulations in 1996 that hint that state tobacco contraband laws were to be excluded as a means of addressing youth smoking. Such circumstances counsel against preemption. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 329 n.6 (1997) ("unlikely that the Congress that enacted ERISA would later have sought to encourage a state program that ERISA would pre-empt."); *id.* at 332 n.7 ("Congress' silence on the pre-emption of state statutes that Congress previously sought to foster counsels against pre-emption. . . .").

[3] Maine Leg. Rec. S-1442 (June 20, 1997) (raising cigarette taxes decreases youth smoking, which "is the main goal here") (Sen. Goldthwait); U.S. Dept. of Transportation, *Reducing Tobacco Use: A Report of the Surgeon General*, 355 (2000) (increasing cigarette taxes would be an effective tool to deter smoking initiation among youth), available at <http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/00_pdfs/Chapter6.pdf> (visited November 3, 2007).

The point is not, as Respondents and the United States suggest, that the Synar Amendment or its regulations mandated these specific Maine provisions. Resp. Br. 20-21, 44-45; U.S. Br. 28. In fact, the Secretary of Health and Human Services specifically chose not to "mandate specific procedures," but instead allowed for flexibility, and therefore nonuniformity, by the States. Pet. Br. 3-4. The point, rather, is that Congress left the task of preventing youth access to tobacco entirely in the hands of the States, which had the authority without the Amendment to regulate carriers. While the parties may quibble over the meaning of "distributor," it is clear that the Secretary's rules contemplate state regulations to control any and all means and "outlets" of getting tobacco to children.[3] It would be strange for Congress, a mere two years after the Amendment's adoption, to counteract

[3] In the final 1996 rule, the Secretary explained

> States [must] have in place a law that prohibits the sale or distribution of any tobacco product to individuals under the age of 18 (minors) through any sales or distribution outlet. This would include sales or distribution from any location which sells at retail or otherwise distributes tobacco products to consumers. . . .

61 Fed. Reg. 1492 (1996). "The term 'outlet' is any location which sells at retail or otherwise distributes tobacco products to consumers *including (but not limited to)* locations that sell such products over-the-counter or through vending machines." 45 C.F.R. §96.130(a) (emphasis added). Delivery sales clearly fall within the scope of these rules.

that effort through a piece of legislation principally aimed at eliminating state tariffs and rate regulation.

Nor does it matter that Maine takes other steps to protect children from delivery sales of tobacco. Resp. Br. 43-44. Respondents do not dispute that there is a problem at the point of delivery in delivery sales if there is no verification, and have not shown that the other measures provide safeguards comparable to those in face-to-face sales. Without controls at the point of delivery, the other provisions have limited effect. *See* Tobacco Control Legal Consortium Br., 11-12.

3. The conclusion that the FAAAA does not oust §§1555-C(3)(C) and 1555-D is reinforced by the presumption against preemption, which fully applies here. Respondents' contention that the presumption does not apply because Congress has principal authority over interstate commerce (Resp. Br. 27-29) is misguided. Whether the presumption applies depends on the tradition and nature of the state law being preempted. *Dillingham*, 519 U.S. at 325. The sovereign States have been regulating public health since the Constitution, and myriad state laws controlling the delivery of unhealthful contraband have been on the books for generations. Not surprisingly, then, this Court applied the presumption when assessing the preemptive effect of the FAAAA in *Ours Garage*. 536 U.S. at 438; *see also Ours Garage*, Brief for the United States as *Amicus Curiae*, 15 ("The presumption is especially compelling in the present context, since 'the regulation of health and safety matters is

primarily, and historically, a matter of local concern.'" (Citation omitted)).

The presumption holds particular force here because of the broad implications of Respondents' position. The lower courts certainly recognized the public health problem resulting from their decisions, Pet. App. 28-29, 44-45, 98, and one of Respondents' *amici* relates that there may be 561 state public health laws preempted by this decision. Fed Ex Br. 19. Moreover, carriers have asserted that the FAAAA not only preempts the two Maine provisions, but also preempts state laws relating to alcohol deliveries. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005), Brief for Cargo Airline Ass'n. as *Amicus Curiae*, at 8-17.[4]

Respondents' efforts to minimize the sweeping impact of their position, as illustrated by various laws cited by Petitioner and its *amici*, are unavailing.[5] First, Respondents discount "at least a third of the laws cited by Maine and its *amici*" on the ground that

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[4] The Cargo Airline Association is a trade association of carriers, including UPS. *Id.* at 1.

[5] Despite Respondents' characterizations, neither Petitioner nor the *amici* States "scoured" all jurisdictions looking for contraband laws that would be affected. Resp. Br. 21, 45-49. Instead, Petitioner listed as examples a few of the Maine laws that were on the books in 1994 and several extant today. Pet. Br. 23-24 nn.36-37. The *amici* States listed an illustrative handful, States' Br. 16 nn.12-17, as did the court of appeals, Pet. App. 27 n.13 ("There are many state laws barring the transport and delivery of contraband.").

"they make criminal only the 'knowing' transportation of certain items," a type of provision upheld by the First Circuit. Resp. Br. 46. Although it is true that Respondents have effectively conceded the validity of those statutes for purposes of this case by not filing a cross-petition, it bears noting that Respondents pointedly declined to " 'concede[ ]' that States can ban retailers entirely from shipping contraband items," or use evidence on the packages to effectively enforce such bans. Resp. Br. 24 n.8.

Some of Respondents' efforts to discount other types of state laws are also wide of the mark. For example, Respondents suggest (Br. 46-47) that the Lacey Act sanctioned the wildlife and plant contraband laws cited in Petitioner's opening brief, Pet. Br. 23 n.36. The Lacey Act did no such thing. That federal statute merely made it a separate federal offense to violate state fish, wildlife and plant laws, with no suggestion that it protected such state laws from constitutional challenge. 16 U.S.C. §3372(a)(2); *see Maine v. Taylor*, 477 U.S. 131, 139 (1986) (Lacey Act Amendments did not immunize state laws from constitutional challenge). Thus, these wildlife statutes, and many other state laws, might well be preempted by the FAAAA if Respondents' position is adopted by this Court. The presumption against preemption was designed precisely to protect such longstanding exercises of States' police powers, absent a more clear statement of congressional intent than is present here.

II. The FAAAA Does Not Preempt The Maine Provisions At Issue Because They Do Not Reference, or Have a Connection With, The "Service[s]" Of Motor Carriers Covered By The FAAAA.

The result is the same when the Maine provisions are examined to determine whether they have a reference to, or are connected with, the "service[s]" of motor carriers.

A. Sections 1555-C(3)(C) and 1555-D Do Not Reference the Service of Carriers Covered by the FAAAA.

As explained in Petitioner's opening brief, and confirmed in the United States' brief, the "reference to" prong only applies to statutes that operate "exclusively" on motor carriers covered by the FAAAA. Pet. Br. 42-43, 48; U.S. Br. 15 n.3. Sections 1555-C(3)(C) and 1555-D apply to all delivery services, including many that are not covered by the FAAAA. *See* Pet. Br. 42-43. Accordingly, the provisions do not run afoul of the "reference to" test.[8]

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[8] Respondents incorrectly characterize §1555-D as mandating that the State "provide lists of licensed and unlicensed tobacco retailers to carriers . . . and to no other entities." Br. 29. The statute requires the State to provide the list to a "delivery service" which is defined to include all persons who deliver packages, not just carriers. 22 Me. Rev. Stat. §§1551(1-C), 1555-D(1).

Respondents' assertion (Br. 36-37) that *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), sets forth a contrary controlling rule is wrong. *Greater Washington* preceded and was clarified by *Travelers*, in which the Court explained that there was no "reference to" an ERISA plan because the surcharges at issue were "imposed upon patients and HMO's, regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan, private purchase, or otherwise," 514 U.S. at 656, and even though the bulk of the market was ERISA plans.

Moreover, Respondents' use of *Greater Washington* is founded on the erroneous assumption that "a carrier's services are 'essential'" to the operation of §1555-C(3)(C). Resp. Br. 37. They are not. As the United States observed in its amicus brief at the *certiorari* stage, "Maine's law ... would apply to small delivery vans and even commercial bicycle delivery services." U.S. Cert. Br. 9. If motor carriers covered by the FAAAA declined to deliver tobacco products altogether, §1555-C(3)(C) would still operate on retailers who sought to ship tobacco through other delivery services.

Finally, Respondents do not explain how the first sentence of §1555-D passes the "reference to" test but the second sentence of that provision (which merely enforces it) and §1555-C(3)(C) do not. And, all contraband delivery laws ban or control the delivery of certain cargo. Under Respondents' arguments, all contraband laws would be preempted under the

"reference to" test, even the first sentence of §1555-D which Respondents no longer contest.

B. Sections 1555-C(3)(C) and 1555-D Do Not Have the Requisite "Connection With" the Service of Carriers Covered by the FAAAA.

1. The Standard.

Respondents and the United States both assert that the proper "connection with" test asks whether the state law has a "forbidden significant effect." Resp. Br. 24 (quoting *Morales*, 504 U.S. at 388); U.S. Br. 8 (same). The post-*Morales* ERISA cases – which, as discussed above, assist in construing the FAAAA preemption provisions as well – refined the test to ask whether the state law has "acute.... economic effects." *See Travelers*, 514 U.S. at 668. The United States, however, argues that this test only applies to laws of general applicability. U.S. Br. 14 n.2. The Court has never so held, and for good reason.

Under the United States' view, a State can ban *everyone* from transporting tobacco, but cannot also specifically ban a subset of *everyone* – for example, retailers – from shipping tobacco except under certain conditions. This is so, even though (1) the public health objectives would be the same, (2) the impact on retailers would be less as it would allow them an opportunity to ship tobacco, and (3) the effect on the carriers would be the same if they simply chose not to provide an option with those conditions. Under such a

view, a state law prohibiting all persons from gambling would be valid, but a subsidiary law prohibiting persons from gambling on airplanes entirely or unless conforming with certain conditions would be preempted. There is no basis in this Court's jurisprudence for such senseless results. That is particularly so here, where the two provisions at issue do no more than implement a generally applicable ban on delivery of tobacco to children.

2. Section 1555-C(3)(C).

a. Respondents have failed to show that §1555-C(3)(C) has a forbidden connection with the service of motor carriers covered by the FAAAA. Section 1555-C(3)(C) instructs *retailers* that, should they wish to ship tobacco products, they must do so in a particular way. If a carrier does not wish to provide that service, it need not. Contrary to the United States' suggestion, the law imposes no obligations whatsoever on carriers. U.S. Br. 16; *see also* Resp. Br. 34. The first clause of §1555-C makes clear that subsection 1555-C(3)(C) and the other provisions of that section apply to "a tobacco retailer shipping tobacco products pursuant to a delivery sale." Neither the lower courts nor Petitioner, who enforces the law, have construed the provision contrary to its plain language so as to impose any obligations on carriers.

The court of appeals found (and neither Respondents nor the United States contest) that a state law banning carriers and other persons from knowingly

transporting tobacco products is permissible and has no connection with services under the FAAAA. Pet. App. 26 (upholding first sentence of §1555-D); Resp. Br. 24, 44; U.S. Br. 17, 29. Yet that is precisely the result of §1555-C(3)(C) should no motor carrier choose to offer the service specified in the provision. Should a carrier offer the service (because, presumably, it finds it profitable to do so), that is its voluntary business decision. To the extent §1555-C(3)(C) affects a carrier at all, it is merely by providing a business incentive to take an action it might not otherwise have taken. This Court has repeatedly held that state laws do not "relate to" a given activity merely by providing an incentive to engage in it. *Dillingham*, 519 U.S. at 332-33; *Travelers*, 514 U.S. at 660-62.

Respondents' basic supposition that §1555-C(3)(C) "dictates what delivery services a carrier must provide to certain packages" (Br. 32), therefore, is wrong because a carrier's choice to provide them is entirely optional with no regulatory repercussions.[7] Respondents do not explain how, if an outright ban is valid, a regulation that produces the same result if carriers choose not to provide an addressee-signature option would not be as well. This case is therefore readily distinguishable from *Morales* and *Wolens*

[7] Respondents mischaracterize carriers as enforcers of Maine's tobacco laws. Br. 17. When carriers, for profit, hand a package of tobacco to a child or deliver contraband tobacco, they are participants in illegal activity, not enforcers.

where the state had no authority to completely ban advertising or frequent flier miles.

The state advertising guidelines and unfair trade laws at issue in those cases, moreover, applied directly to the airlines covered by the ADA. Likewise, the statute at issue in *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001), "binds plan administrators to a particular choice of rules for determining beneficiary status." By contrast, carriers are not bound by §1555-C(3)(C) because it imposes no obligations upon carriers.

As discussed earlier, the most that could be said about the provision's impact is that it might provide an economic incentive to provide a new service. This Court's cases conclusively establish that such incentives do not amount to the requisite "connection." Therefore, the United States' response that the State is nonetheless indirectly "employing its coercive power to police the method by which carriers provide services in the state," Pet. App. 24, *cited in* U.S. Br. 17, is also without merit.[8] Indeed, the United States concedes that under §1555-D, Maine can prohibit carriers from transporting contraband, thus affecting the methods of delivery. Section 1555-C(3)(C) on the other hand requires a carrier to do nothing unless it

[8] In addition, the United States' proposed test, which relies upon the preexistence of the prescribed option, U.S. Br. 17, also places public health policy in the hands of private carriers in an unprecedented fashion.

wants to compete for the legal tobacco delivery market. And if the specified method of delivery is not available, the retailer is effectively banned from shipping the goods, a ban the United States and the court of appeals otherwise find constitutional.

This Court's decision in *Granholm* provides further confirmation of the validity of §1555-C(3)(C). The Court recognized that requirements such as adult signature and labels were "less restrictive" than bans. 544 U.S. at 490-91. And the FTC report relied upon by the Court explained that in addition to regulating the suppliers, States also could "impose similar requirements on package delivery companies as on retail stores," to "'check customers for valid identification to verify age,'" "such as by examining a picture identification." FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine*, 29 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (visited October 29, 2007). Of course, Maine does not go that far, for §1555-C(3)(C) does not impose "requirements on package delivery companies." If States could enact even a law directly imposing those requirements, it follows *a fortiori* that Maine's provisions are valid.

b. Respondents make no effort to, and apparently concede they cannot, meet the "acute" effects standard with respect to §1555-C(3)(C). Their effort to meet the lesser standard of "forbidden significant effect" (Br. 9-13, 32-34) also falls short, even on the mistaken assumption that the incentives the provision creates for carriers implicates the "connection with" test.

First, the impact on carriers of the first sentence of §1555-D is likely greater than that of §1555-C(3)(C). As the court of appeals reasoned, a carrier can comply with §1555-D simply by declining to transport the tobacco. Pet. App. 26. Respondents have not explained why the same declination does not suffice for §1555-C(3)(C).

Second, Respondents' evidentiary case rests on conclusory assertions, without the benefit of any studies, statistics, data or hard evidence – and this from a company that studies subjects as "mundane" as where drivers should place their ignition keys. Resp. Br. 7-8.[9] UPS has various procedures and systems in place which on their face seem easily adaptable to provide an addressee-signature option; UPS fails to present evidence why it is burdensome to do so. For example, UPS provided no evidence that its preexisting procedure of multiple delivery efforts with the driver leaving a notice when the recipient is not readily available (which we all have found on our front door) will not suffice. *See* Pet. Br. 14 & n.27. There is no requirement in the law that the driver search out an *addressee* any more than he must search out a *recipient* over the age of 21 before

[9] It should be noted that most of Respondents' case in support of their motion for summary judgment is based upon the declaration of a UPS employee submitted after her deposition and with the motion. J.A. 39-65. As a result, the conclusory statements made therein went largely untested, are not supported with any data, study or statistics, and in some instances contradict her previous testimony.

quickly leaving the notice under its present age-verification option. In sum, UPS procedures do not require the driver to wait, and there is nothing in §1555-C(3)(C) mandating that he do so.

UPS's computer-DIAD system has information about shippers, the commodities that they ship, and consignees, and UPS's DIADs provide alerts for signature and age options and can be programmed to generate a prompt for a particular shipper or package to direct the driver's behavior. J.A. 101-03; Pet. Br. 12-13; Resp. Br. 11 n.3. There is no explanation why that system cannot easily and inexpensively be utilized for addressee-signature options. While it may require some minor adjustments, UPS updates its systems constantly and has yet to present evidence showing that the costs of doing so are significant. Respondents' claims of "economic infeasibility" (Br. 32-33 & nn.11 & 13) are based on no feasibility studies, data or statistics – only bare unsupported, conclusory assertions. *E.g.*, J.A. 55, 59.

Finally, Respondents argue that even if a *new* option of addressee-signature confirmation costs only a few cents more than preexisting options, that in and of itself shows that Maine's law "relates to carrier" prices, and thus *ipso facto* is preempted. Resp. Br. 33. Of course, *Morales*, the ERISA cases, and Respondents' own concessions show that it is not *any* effect on prices that requires preemption but only an effect that is "acute" or at least "significant," and a few cents a package that UPS can pass on to the customers is not that.

3. Section 1555-D.

a. The second sentence of §1555-D does not have a forbidden "connection" with motor carriers services either. Respondents fail to explain how the first sentence of §1555-D is not preempted under ERISA analysis but the second sentence is. Because Respondents accept that Maine can prevent the knowing delivery of contraband tobacco under §1555-D, logically Maine must be able to enforce those laws. Petitioner has repeatedly expressed concern that the court of appeals' reasoning disallows the use of evidence of markings or labels in a court of law against carriers to prove knowledge – with or without the evidentiary presumption. This would leave §1555-D as well as any other contraband law unenforceable against carriers. Pet. Br. 46-47. Insofar as we can tell, that is precisely Respondents' position.

Respondents' statement that Maine can enforce the prohibition of §1555-D with "evidence of actual knowledge," Br. 44, begs the question. Respondents have not conceded, and therefore presumably disagree, that evidence on the outside of the box (markings and labels) is "evidence of actual knowledge." Respondents fail to identify any evidence upon which §1555-D or a ban against furnishing tobacco to children such as §1555-B(2) could be enforced against a carrier. Respondents suggest (Br. 44) that the decision in *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. App. Ct. 2000), shows that a case can be made against a trucker without relying on imputed knowledge. The decision

does nothing of the sort. In that case, the trucker lost his vehicle to forfeiture because he failed to prove that he did not know he was hauling cigarettes. From the decision, we do not know what evidence was presented. All we know is that under Respondents' approach, the State could not use cigarette markings on packages to rebut a trucker's assertion that he did not know he was transporting cigarettes.

b. Without such evidence, neither the first sentence of §1555-D nor §1555-B(2) (nor, for that matter, any ban on contraband) can be effectively enforced against a carrier. On the other hand, if the evidence can be used without the evidentiary presumption, the practical effect is the same: in order to avoid prosecution a carrier must look for markings and labels, J.A. 34, 36, 37, and do something about them, *i.e.*, make sure the retailer or recipient is licensed, or not hand over the package to a child. The evidentiary presumption does little to change the effect on carriers or the alleged patchwork of state laws.

c. The United States presents a strained reading of Maine's law, suggesting that the first part of §1555-D is a law of general application but the evidentiary provision is not. U.S. Br. 21. That is not the case. Both portions of the provision apply to "a person," *i.e.*, to all *persons*, not just delivery persons or carriers. While the lists of licensed and unlicensed retailers are provided to delivery services (which encompasses a group larger than just motor carriers), §1555-D is enforced against anyone, and providing

the list to delivery services under §1555-D(4) simply gives them the opportunity to better protect themselves.[10]

Respondents have not shown that the second sentence of §1555-D imposes a significant burden, much less an "acute" one. The only estimate of additional time to comply with Maine's law is that it costs less than a penny a package to look at the label. Pet. Br. 12. The suggestion that it is burdensome to notice markings such as those found at J.A. 34, 36 and 37 is absurd.[11]

Respondents have failed to present any evidence that UPS's computer-DIAD system cannot easily handle the identification of licensees. Indeed, UPS continued to deliver tobacco to licensees in Maine using its preexisting systems. Resp. Br. 10.[12] And, as part of its agreement with New York, it appears that UPS is doing virtually the same tasks about which

[10] Respondents pointed out that the list of unlicensed retailers was improperly placed on the Petitioner's website. That error was corrected.

[11] UPS's "additional training" (Br. 31) consisted of a few regularly-scheduled three-to five-minute work-shift meetings in Maine, J.A. 77, revealing just how simple it is to comply.

[12] Respondents' claim of "abandoning lawful deliveries from Maine-licensees" (Br. 31) is unfounded. Respondents do not challenge Maine's laws that require a delivery retailer to be licensed, or that tobacco sold by a nonlicensee is contraband. 22 Me. Rev. Stat. §§1555-C(1) & (7); Resp. Br. 7, 43. There is no evidence that any retailer had such a license, or that UPS declined business from a licensed retailer.

they complain in this case without any identified "far-reaching disruptions." Pet. Br. 15-16.

Respondents' assertion (Br. 30) that §1555-D imposes a "Herculean task" with respect to processing and handling packages with tobacco markings or labels on them is wildly overstated. As noted in our opening brief, the DIAD system already can alert the driver regarding a particular shipper or address (J.A. 101-03), and procedures are already in place for packages that cannot be delivered. Pet. Br. 13-14 & n.27. In other words, UPS already has uniform procedures to deal with tobacco packages in the same manner as other types of material, such as those containing alcohol and firearms.

At the core of Respondents' argument is the suggestion that the whole system will break down if UPS's sorting processes are just a few minutes late. Resp. Br. 9. There is no evidence such a delay will occur, and any such delay arises out of compliance with the first sentence of §1555-D that Respondents no longer contest. Moreover, UPS's system contemplates additional time for a variety of actions, such as identifying damaged packages, identifying packages with hazardous waste, alcohol or firearms, weather problems, and truck breakdowns. J.A. 69-70. Respondents fail to present any data, statistics or study that Maine's law would acutely or significantly affect UPS's operations in light of these other time-consuming issues, which appear to be handled without a systematic breakdown. Much more is required

before a state law has a "significant" or "acute" effect such that it is preempted by a "related to" provision.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General

6 State House Station
Augusta, ME 04333-0006
(207) 626-8568
(207) 287-3145 (fax)

Counsel for Petitioner